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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte FUNG-JOU CHEN, JULIE BEDNARZ, JEFF LINDSAY, DAWN
HOUGHTON, LESLIE TANERI, TAMMY BALZAR, and PEIGUANG
ZHOU

Appeal 2009-006344
Application 10/036,736
Technology Center 3700

Decided: September 23, 2009

Before TONI R. SCHEINER, DEMETRA J. MILLS, and
RICHARD M. LEBOVITZ, *Administrative Patent Judges*.

LEBOVITZ, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on the appeal by the patent applicants from the patent examiner's rejection of claims 1-8, 67-77, 79-86, 89-97, 114-121, 127, 129-134, 136, and 137 under 35 U.S.C. §§ 102 and 103. The Board's

jurisdiction for this appeal is under 35 U.S.C. § 6(b). We reverse the rejections.

STATEMENT OF THE CASE

The claims concern a sponge-like product with an abrasive surface. The product can be used for cleaning (Spec. 1). Claims 1-8, 67-77, 79-86, 89-97, 114-121, 127, 129-134, 136, and 137 are pending and stand rejected by the Examiner as follows:

- Claims 1-5, 7, 67-71, 73, 75-77, 79-85, 92-97, 114-117, 120, 121, 127, 129-134, 136, and 137 under 35 U.S.C. § 102(b) as anticipated by Chen (US 5,990,377, Nov. 23, 1999) (Ans. 3); and
- Claim 2, 6, 8, 68, 72, 74, 86, 89, 90, 91, 118, and 119¹ under 35 U.S.C. § 103(a) as obvious in view of Chen (Ans. 5).

Claims 1, 67, 101, 114, and 127 are independent; the remaining pending claims depend on claims 1, 67, 114, and 127 and incorporate all their limitations. Claim 1 is representative and reads as follows:

1. An absorbent sponge-like product for cleaning a surface, the sponge-like product comprising:
a multi-layer compressible substrate, said substrate comprising a plurality of stacked plies of a textured paper web, the paper web having an Overall Surface Depth of greater than about 0.2mm, the paper web comprising pulp fibers, the paper

¹ Claims 101-113 and 135 were listed in the Examiner's statement of the rejection. However, Appellants filed an amendment after the final rejection canceling claims 101-113 and 135 to simplify the issues on appeal (Mar. 13, 2008). On page 2 of the Appeal Brief, Appellants stated that such claims were cancelled and that all amendments had been entered. The Examiner, on page 2 of the Answer, responded that Appellants' summary of the claim status and amendment status was correct. Therefore, we treat claims 101-113 and 135 as cancelled.

web having a basis weight of at least about 10 gsm, the paper web containing a wet strength agent, said plies being attached together;

an outer cover that allows water to pass therethrough, said compressible substrate being enclosed by the outer cover, the outer cover comprising a flexible porous material; and

abrasive particles attached to the outer cover to facilitate scrubbing of the surface, wherein the abrasive particles comprise filler particles or microspheres.

ANTICIPATION

Claims 1-5, 7, 67-71, 73, 75-77, 79-85, 92-97, 114-117, 120, 121, 127, 129-134, 136, and 137 stand rejected under 35 U.S.C. § 102(b) as anticipated by Chen (Ans. 3).

Statement of the Issue

The issue in this appeal is whether Chen describes an absorbent article with an “abrasive” surface. There are four independent claims on appeal, each which contains an “abrasive” limitation.

Claim 1 is to a “sponge-like product for cleaning a surface” comprising a “multi-layer compressible substrate,” an “outer cover,” and “abrasive particles attached to the outer cover to facilitate scrubbing of the surface, wherein the abrasive particles comprise filler particles or microspheres.”

Claims 67 and 114 are to the same type product as in claim 1. Claim 67 recites that the “abrasive fibers attached to the outer cover to facilitate scrubbing the surface, wherein the abrasive fibers include meltblown shot.” Claim 114 recites that the outer cover has “an abrasive surface defining said primary surface, wherein said abrasive surface comprises meltblown shot.”

Claim 127 is to a method of making a sponge-like pad with a “liquid pervious cover” that “defines an abrasive surface comprising meltblown shot.”

The Examiner found that the adhesive regions on the upper surface of Chen’s absorbent article basesheet satisfied the claimed limitation of “abrasive particle” as in claim 1 and an “abrasive” surface comprising “meltblown shot” as in claims 67, 114, and 127.

Appellants contend that the Examiner erred in finding that Chen’s adhesive satisfies the claimed “abrasive” limitations.

Principles of Law

The “Board gives claim language its broadest reasonable interpretation consistent with the specification.” *In re Buszard*, 504 F.3d 1364, 1368 (Fed. Cir. 2007).

“[I]n an ex parte proceeding to obtain a patent, . . . the Patent Office has the initial burden of coming forward with some sort of evidence tending to disprove novelty.” *In re Wilder*, 429 F.2d 447, 450 (CCPA 1970).

A claim limitation is inherent in the prior art if it is necessarily present in the prior art, not merely probably or possibly present. *Rosco v. Mirror Lite*, 304 F.3d 1373, 1380 (Fed. Cir. 2002). “[T]he dispositive question regarding anticipation is whether one skilled in the art would reasonably understand or infer from the prior art reference’s teaching that every claim [limitation] was disclosed in that single reference.” *Dayco Prods., Inc. v. Total Containment, Inc.*, 329 F.3d 1358, 1368 (Fed. Cir. 2003) (internal quotation marks and alterations omitted).

Akamai Technologies Inc. v. Cable & Wireless Internet Services Inc., 344 F.3d 1186, 1192 (Fed. Cir. 2003).

The PTO does not have the ability “to manufacture products or to obtain and compare prior art products.” *In re Best*, 562 F.2d 1252, 1255 (CCPA 1977). Thus, once “the PTO shows sound basis for believing that the products of the applicant and the prior art are the same, the applicant has the burden of showing that they are not.” *In re Spada*, 911 F.2d 705, 708 (Fed. Cir. 1990).

Findings of Fact

1. Chen describes a dual-zoned, three-dimensional absorbent web for absorbent articles such as feminine pads and diapers (Abstract).
2. The web comprises a basesheet having an upper and lower surface, the upper surface having elevated and depressed regions (col. 7, ll. 37-42).
3. Hydrophobic materials are preferentially deposited on the elevated regions of the basesheet (col. 8, ll. 46-52).
4. The hydrophobic materials are attached by adhesives and other agents, including hot melts, latexes, glues, starch, and waxes (col. 5, ll. 39-42).
5. “Adhesive application can be through meltblown application of hot melt glues and thermoplastic materials, spray or swirl nozzles of melted or dissolved adhesives, printing of adhesive material onto one or both surfaces before joining, and the like.” (Col. 5, ll. 49-53.)
6. The adhesives can be “applied directly to the basesheet by means of spray, mist, aerosol, or droplets in any form, prior to contact of the basesheet with the hydrophobic matter” (col. 5, ll. 53-55).
7. Chen describes an example in which an adhesive is applied to the basesheet (col. 45, ll. 38-41). The “spray adhesive used was 3M #90 High Strength Adhesive.” (*Id.* at col. 45, ll. 51-52.)

8. In this example, Chen states that the “adhesive-containing regions . . . were noticeably stiffer than the surrounding basesheet” (col. 45, ll. 59-60).

Analysis

All the independent claims in this appeal involve a sponge-like product with an “abrasive” surface for cleaning. The Examiner contends that Chen’s description of surface adhesive which is “noticeably stiffer” than non-coated regions of an absorbent article basesheet meets the “abrasive” limitation. Appellants challenge the Examiner’s finding. Because the term “abrasive” is in dispute in this appeal, we begin our analysis with interpreting its meaning.

Claim language is given its broadest reasonable interpretation consistent with the specification. *In re Buszard*, 504 F.3d at 1368. In this case, the Specification does not provide an express definition of what it means to be “abrasive.” Therefore, we give it its ordinary meaning discerned from a general purpose dictionary: “any material or substance used for grinding, polishing, or smoothing as emery, pumice, or sandpaper.”² This definition is consistent with the Specification which describes the abrasive surface as being “for scrubbing” (Spec. 28:23-24), as well as claims 1 and 67 which expressly state that the abrasive is to “facilitate scrubbing.”

The Examiner found that the adhesive applied to the upper basesheet layer of Chen’s absorbent article was an abrasive. The evidence for this finding was Chen’s statement in one example that the “adhesive-containing regions . . . were noticeably stiffer than the surrounding basesheet” (FF8).

² RANDOM HOUSE COLLEGE DICTIONARY 5 (Rev. Ed. 1982).

Thus, this case turns on the question of whether the Examiner satisfied the initial burden of showing that Chen's adhesive is a material or substance used for grinding, polishing, or smoothing as we have interpreted the term "abrasive" to require. *See In re Wilder*, 429 F.2d at 450.

The Examiner has not met her burden. The record lacks evidence or sound reasoning that the "stiffer" adhesive acts as an "abrasive"; or that it would have been understood by persons of ordinary skill in the art to be an "abrasive" material used for grinding, polishing, or smoothing a surface. While an abrasive might accurately be characterized as "stiffer" than surrounding non-abrasive surfaces, the Examiner has not established that every stiff material would serve as an abrasive as required by the claims. Various adhesive type materials are disclosed in Chen (FF4, 5, 7), but the Examiner has not presented a reasonable basis for believing that one such material, when coated on the upper basesheet, would necessarily be an abrasive surface as required by all the claims. *See In re Spada*, 911 F.2d at 708.

OBVIOUSNESS

Claim 2, 6, 8, 68, 72, 74, 86, 89, 90, 91, 118, and 119 stand rejected under 35 U.S.C. § 103(a) as obvious in view of Chen (Ans. 5).

The Examiner found that Chen did not disclose, but made obvious certain limitations recited in the dependent claims. This rejection, however, did not address the defect identified above, i.e., that Chen does not describe an "abrasive" as recited in independent claims 1, 67, 114, and 127. Therefore, we are compelled to reverse the rejection of claims 2, 6, 8, 68, 72, 74, 86, 89, 90, 91, 118, and 119 as these depend upon and incorporate all the limitations of claims 1, 67, 114, and 127.

CONCLUSION OF LAW & SUMMARY

The Examiner erred in finding that Chen's description of adhesive regions on the upper surface of Chen's absorbent article basesheet met the claimed limitation of "abrasive particle" as in claim 1 and an "abrasive" comprising "meltblown shot" as in claims 67, 114, and 127.

The anticipation and obviousness rejections of claims 1-8, 67-77, 79-86, 89-97, 114-121, 127, 129-134, 136, and 137 are reversed.

REVERSED.

Ssc:

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